IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BLUEFIELD DIVISION

FREEDOM FROM RELIGION FOUNDATION, INC. et al., Plaintiffs, v. MERCER COUNTY BOARD OF EDUCATION et al., Defendants.	Civil Action No. 1:17-cv-00642 Hon. David A. Faber ORAL ARGUMENT REQUESTED

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

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This is Plaintiffs'[1] second effort to craft a viable complaint against Defendants,[2] asking this Court to forever end all Bible classes of any kind taught in public school in Mercer County, West Virginia. After Plaintiffs reviewed Defendants' Motion to Dismiss the original Complaint (ECF Nos. 19-20) setting forth in detail why Plaintiffs lacked standing and failed to state any cognizable claim, they elected to file an Amended Complaint (ECF No. 21 (hereinafter "FAC")) pursuant to Fed. R. Civ. P. 15(a)(1)(B). The FAC does not solve the problems with the original Complaint, even though out-of-state serial plaintiff Freedom from Religion Foundation found two more plaintiffs to join it, because those new plaintiffs—Elizabeth Deal and her child Jessica Roe—also lack standing. FFRF tried and failed to manufacture standing in this Circuit before under similar circumstances in *Moss v. Spartanburg County School District Seven*, 683 F.3d 599 (4th Cir. 2012), which was dismissed for many of the same reasons this case ought to be.

FFRF has failed to locate a *Goldilocks* plaintiff.[3] The original plaintiffs Jane and Jamie Doe (and FFRF, whose associational standing can be based only on Jane Doe, its member) are "too hot"—they filed suit too soon, well before Jamie Doe, a kindergartener, was eligible to attend the Bible classes, meaning any purported injury is not certainly impending and is instead merely speculative. The new plaintiffs Deal and Roe are "too cold"—they joined this suit nearly a year after Roe began attending school in a different school district with no plans to return to school in Mercer County. On those facts and the particular claims they have brought, Deal and Roe lack standing. But unlike porridge, combining the plaintiffs who are "too hot" with the plaintiffs who are "too cold" does not create a mix of plaintiffs who are "just right," as it appears FFRF is now attempting. Standing must be evaluated as to each plaintiff separately, and the Court should dismiss this case for lack of subject matter jurisdiction.

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[1] The term "Plaintiffs" refers to Jane Doe, her child Jamie Doe, the Freedom From Religion Foundation or "FFRF," Elizabeth Deal, and her child Jessica Roe.

[2] The term "Defendants" refers to the Mercer County Board of Education, Mercer County Schools, and Mercer County Schools' Superintendent Dr. Deborah S. Akers; the term does not refer to Rebecca Peery.

[3] *E.g.*, *The Story of Goldilocks and the Three Bears*, http://www.indiana.edu/~slavicgf/e103/class/2011_02_09/goldilocks.htm (last visited Apr. 15, 2017).

Even if Plaintiffs had standing to bring this case, it should be dismissed for failure to state a claim. Plaintiffs ask the Court to end Bible classes of any kind in Mercer County Schools, despite the fact that over a half century of well-settled law holds that the Constitution permits such classes in public schools. Plaintiffs attempt to avoid this longstanding precedent by devoting pages of the FAC to the particular curriculum used in the Mercer County "Bible in the Schools" program, but that is a red herring, designed to distract from the fact that their actual complaint (and concomitant requested relief) is with the per se existence of ***any*** courses that have anything to do with the Bible.

The Court should also dismiss Plaintiffs' individual capacity claims against Dr. Akers, which are supported only by conclusory allegations that are not entitled to a presumption of truth. And the Court should likewise dismiss Plaintiffs' claims against Mercer County Board of Education and Mercer County Schools under 42 U.S.C. § 1983, which are insufficiently pled under Rule 8.

I. FACTUAL BACKGROUND

Jane Doe is the mother of Jamie Doe, a student who attends an (unspecified) elementary school in Mercer County, West Virginia.[4] (FAC ¶¶ 10-11.) Jamie Doe is enrolled in kindergarten for the 2016-2017 school year. (*Id.* ¶ 11.) Jane Doe is an atheist who wishes to

[4] For the purpose of this Motion to Dismiss only, Defendants assume that all well-pleaded facts in the FAC are true, as must the Court. *See Kyser v. Edwards*, No. 2:16-CV-05006, 2017 WL 924249, at *4 (S.D.W. Va. Feb. 9, 2017) (Tinsley, M.J.) ("Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation[.]") (citation, quotations, and subsequent history omitted).

raise Jamie Doe "without religion." (*Id.* ¶ 31.) She is a member of FFRF, a "national" nonprofit organization that "defends the constitutional principle of separation between state and church." (*Id.* ¶¶ 8-9.)

Elizabeth Deal is the mother of Jessica Roe, a student who used to attend elementary school in Mercer County, West Virginia, first at Memorial Primary School and then at Bluefield Intermediate School. (*Id.* ¶¶ 12, 34, 43, 48.) Deal does not allege that she is a member of FFRF. When Roe attended school in Mercer County, Deal did not sign a permission slip for her to attend the "Bible in the Schools" program classes (*id.* ¶¶ 35, 38), and so Roe accordingly was placed elsewhere in the school while they took place (*id.* ¶¶ 42, 44).[5] Deal removed Roe from Mercer County Schools this school year; she now attends school in a "neighboring school district." (*Id.* ¶ 48.)

There are nineteen public elementary schools in Mercer County. (*See* Mercer County Public Schools, *Elementary Schools*, http://boe.merc.k12.wv.us/?q=node/5 (last visited Apr. 15, 2017) (attached as **Exhibit A** to the Declaration of Kermit J. Moore ("Moore Declaration") filed concurrently)).[6] Fifteen of those elementary schools offer classes as part of the "Bible in the Schools" program, reaching approximately 4,000 students—the "overwhelming majority" of those enrolled. (FAC ¶¶ 24-25, 62.) Accordingly, four elementary schools do ***not*** offer such classes. The classes are offered to elementary school students once per week and last for 30 minutes. (*Id.* ¶ 61.) They are not offered to kindergarten students; instead, instruction is offered "beginning in first grade." (*Id.* ¶ 11.) Participation is voluntary, and school policy requires

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[5] The FAC alleges that an initial problem with where Roe was placed during the classes was corrected after a complaint by Deal. (FAC ¶¶ 39-40.)

[6] "A court may take judicial notice of information publicly announced on a party's web site, so long as the web site's authenticity is not in dispute and 'it is capable of accurate and ready determination.'" *Jeandron v. Bd. of Regents of Univ. Sys. of Md.*, 510 F. App'x 223, 227 (4th Cir. 2013) (citing Fed. R. Evid. 201(b)).

"reasonable alternatives for students who opt-out." (*Id.* ¶¶ 62-63.) Jane Doe allegedly "received information from the school system about its bible [*sic*] classes," but the FAC does not say what information she received or the manner in which it was received. (*Id.* ¶ 32.) Jane Doe does not allege that she sought or intended to seek "reasonable alternatives" for Jamie Doe, nor that Jamie's school denied or intended to deny any such request.

In 1985, the West Virginia Office of the Attorney General issued an opinion explaining that Bible instruction in West Virginia's public schools is permissible so long as certain guidelines are followed. (Complaint, ECF No. 1, at ¶¶ 19-21, 33.) A copy of this opinion is attached as **Exhibit B** to the Moore Declaration.[7] Although the original Complaint contained these relevant allegations, they are omitted from the FAC. The program receives no public funding; instead, it is funded by the non-profit Bluefield Bible Study Fund, Inc. (FAC ¶ 24.)

On May 8, 2015, more than a year before Jamie Doe began attending kindergarten,[8] FFRF sent a "freedom of information request to Mercer County Schools" asking for information about the "Bible in the Schools" program and "copies of certain course materials." (*Id.* ¶ 51.) Neither FFRF nor Doe allege that Mercer County provided Doe with similar information or materials about the Bible program in connection with Jamie Doe's enrollment in school. FFRF received responsive information to its request on August 26, 2016 and September 12, 2016. (*Id.* ¶¶ 52, 65.) Plaintiffs commenced this lawsuit shortly thereafter, on January 18, 2017 (*see* ECF No. 1), and much of the FAC is devoted to allegations about specific aspects of the course

[7] The Court may consider this opinion in deciding Defendants' Motion to Dismiss without converting it into a summary judgment motion because it is integral to the FAC's allegations. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir. 2011).

[8] Jamie Doe's first day of kindergarten was August 10, 2016. (*See* Mercer County Public Schools, *2016-2017 Student Calendar*, at 2-3, http://boe.merc.k12.wv.us/downloads/2016_2017%20Student%20Calendar.pdf (last visited Apr. 15, 2017) (attached as **Exhibit C** to the Moore Declaration).) The Court should take judicial notice of this document for the reasons stated in Note 1.

materials FFRF received in response to its request (FAC ¶¶ 51-89). Deal and Roe joined this lawsuit on March 28, 2017. (*See generally* FAC.)

Plaintiffs request a declaration that "Defendants' conduct" is unconstitutional, that Defendants be permanently enjoined from "organizing, administering, or otherwise endorsing" Bible classes of any kind for students of Mercer County Schools "in grades kindergarten through eighth grade," that plaintiffs Deal and Roe be awarded nominal damages, and that Plaintiffs be awarded attorneys' fees and costs. (*Id.* at pp. 20-21.)

II. ARGUMENT

A. No Plaintiff Has Standing

1. *Plaintiffs Doe and Plaintiff FFRF Do Not Have Standing*

Plaintiffs Jane and Jamie Doe lack standing to prosecute this action because none of them have alleged concrete injuries that have occurred or are certainly impending. As the Supreme Court held in *Clapper v. Amnesty International USA*:

> To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling. Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes–that the injury is certainly impending. Thus, we have repeatedly reiterated that threatened injury must be certainly impending to constitute injury in fact, and that allegations of possible future injury are not sufficient.

133 S. Ct. 1138, 1147 (2013) (citations and quotations omitted).[9] Indeed, Jane Doe does not allege that Jamie Doe participated in the Bible in the Schools program or was ostracized due to non-participation, probably because Jamie Doe is too young to enroll in the program, so she has

[9] Plaintiffs do not claim they have taxpayer standing. Nor could they: under the *Flast* exception to the general rule prohibiting taxpayer standing, Plaintiffs must at a minimum show that "tax dollars are 'extracted and spent'" on the challenged conduct. *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 138-39 (2011) (citing *Flast v. Cohen*, 392 U.S. 83, 106 (1968)). But the Bible class at issue in this litigation is entirely financed by the Bluefield Bible Study Fund, Inc., an independent non-profit. (FAC ¶¶ 23-24.)

not been forced to make the "untenable choice[]" she alleges she will have to make at some point in the future. (FAC ¶ 33.)

FFRF does not allege direct standing. And FFRF's associational standing in this litigation is entirely dependent on Jane Doe's personal standing (since she is FFRF's member and FFRF does not allege that it is injured (FAC ¶ 9)). *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 155 (4th Cir. 2000) ("[A]n association may have standing to sue in federal court either based on an injury to the organization in its own right or as the representative of its members ***who have been harmed***.") (emphasis added). As out-of-state plaintiff FFRF knows from its own history of attempting to manufacture standing for itself in this Circuit, even a promotional letter sent to its member is not sufficient for standing (and Jane Doe does not even make ***that*** allegation); instead, Plaintiffs' allegations about the Bible in Schools program are based almost entirely on information that ***FFRF*** received in response to a freedom of information request, which is plainly insufficient to create standing for ***Jane Doe***. *See Moss*, 683 F.3d at 606 ("Our conclusion that Tillett [who received a letter concerning Bible curriculum] was not injured by the School District's policy requires the further conclusion that the Freedom From Religion Foundation also lacks standing."); *see also Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) ("[A]n organization whose members are injured may represent those members in a proceeding for judicial review. But a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization in evaluating the problem, is not sufficient.") (citation omitted).

There are at least three specific reasons why the Does and FFRF lack standing to bring this case:

First, Jamie Doe is enrolled in kindergarten (FAC ¶ 11), yet the Bible classes Plaintiffs challenge are only offered to students in the first grade or above (*id.* ¶¶ 11, 29, 33). As such, the purportedly "untenable choice[]" the Does face and on which they base their so-called injury was, at a minimum, over seven months away when they initially filed this suit, the relevant date for this analysis. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 571 n.5 (1992) ("standing is to be determined as of the commencement of suit"); *Beck v McDonald*, 848 F.3d 262, 271 (4th Cir. 2017) ("And while it is true that threatened injuries rather than actual injury can satisfy Article III standing requirements [in certain circumstances], not all threatened injuries constitute an injury-in-fact. Rather, as the Supreme Court has emphasized repeatedly, an injury-in-fact must be concrete in both a qualitative and temporal sense.") (citations and quotations omitted); *cf.* Moore Declaration **Ex. C** (showing that the 2016 school year began in August). The allegation that Jane Doe may have to make an "untenable choice[]" in August 2017 does not constitute an injury-in-fact in January 2017, even if the Does think it is reasonably likely they will have to make their choice during the next school year. *See Beck*, 848 F.3d at 276 ("Further, we read *Clapper*'s rejection of the Second Circuit's attempt to import an 'objectively reasonable likelihood' standard into Article III standing to express the common-sense notion that a threatened event can be 'reasonably likely' to occur but still be insufficiently 'imminent' to constitute an injury-in-fact.") (citation omitted); *see also Chambliss v. Carefirst, Inc.*, 189 F. Supp. 3d 564, 570 (D. Md. 2016) ("Under *Clapper* . . . an 'objectively reasonable likelihood' of harm is not enough to create standing, even if it is enough to engender some anxiety."). The Complaint therefore fails to show the Does have an actual or imminent spiritual injury as a result of "direct and unwelcome contact with an alleged religious establishment in their community." *Moss*, 683 F.3d at 605 ("[W]e must guard against efforts . . . to derive standing from the bare fact of disagreement with a government policy, even passionate disagreement premised on

Establishment Clause principles. Such disagreement, taken alone, is not sufficient to prove spiritual injury.”).

Second, the Does allege that the Bible course is offered in fifteen elementary schools in Mercer County (FAC ¶ 25), but there are nineteen elementary schools in the County (*see* Moore Declaration **Ex. A**). Although Jamie Doe now attends kindergarten at “at an elementary school within Mercer County Schools that offers bible [*sic*] classes beginning in first grade” (FAC ¶ 11) and Jane Doe “plans on Jamie Doe attending first grade at the same school” (*id.* ¶ 29), the FAC fails to say that Jamie is unable to attend one of the four elementary schools in Mercer County where the course is ***not*** offered. The FAC attempts to skirt this deficiency by pleading in the most conclusory fashion that Jamie Doe’s school is the “most convenient” (*id.* ¶ 30), but this is insufficient. *Lujan*, 504 U.S. at 561 (“The party invoking federal jurisdiction bears the burden of establishing [standing]. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff’s case, each element must be supported . . . .”) (citations omitted); *cf. Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) (“Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”). Because, as discussed above, the Does’ purported injuries are not “certainly impending,” they are not permitted to “manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm,” *Clapper*, 133 S. Ct. at 1151, by choosing to enroll Jamie in a school where the course is offered if an alternative school where the course is not offered is available to them.[10] That the Does and FFRF are attempting to manufacture standing to bring

[10] *Suhre v. Haywood Cty.*, 131 F.3d 1083 (4th Cir. 1997), is inapposite. That pre-*Clapper* case stands for the proposition that someone who is already injured by coming into direct contact with an allegedly offensive religious display need not ***also*** “change[] his behavior in response to the display” in order to have standing to sue. *Id.* at 1087. That is far different from attempting to manufacture standing when direct contact is not certainly impending.

this lawsuit is further bolstered by the fact that serial plaintiff FFRF submitted a freedom of information request for the curriculum of the Bible classes over a year before Jamie Doe began attending school, and over two years before he could potentially even be eligible to attend a Bible class. (FAC ¶¶ 11, 51; *see also* Note 8, *supra*.)

Third, as explained in more detail in Section II.B, *infra*, the Complaint as pleaded is a facial challenge to Mercer County Schools offering voluntary Bible classes at all (which does not state a valid legal claim), not to the particular content of those classes. However, to the extent the Complaint is attempting to challenge the specific content of the Bible classes, the Does do not have standing to do so—they do not allege they have ever encountered the specific content of the classes or that it in any way drives Jane Doe's (future) decision-making process, let alone that the Does have been injured by it. *Compare Moss*, 683 F.3d at 606 (finding plaintiff, her child, and FFRF lacked standing because "[t]hey had no personal exposure to the . . . [Bible] course apart from their abstract knowledge . . . . they have alleged nothing to suggest that the policy or the Bible School course injured them in any way. . . . [the] child never participated in the course and had not been pressured or encouraged to attend the course by anyone. Neither [the parent] nor her child suffered any adverse repercussions from the child's decision not to enroll in the course. . . .[and they] do not suggest that they were the targets or victims of alleged religious intolerance . . . ."). That is likely why they do not say the purported future need for Jamie Doe to opt out of the Bible class is based on its specific curriculum; instead it is based on the fact that Bible classes are generally offered ***at all***. (*See* FAC ¶ 32 ("Jane Doe does not wish for Jamie to participate in ***any school bible*** [*sic*] ***courses*** or to be ostracized . . . because of Jamie's nonparticipation."); *id.* ¶ 113 ("Forcing Jane Doe to choose between putting her child ***in a bible*** [*sic*] ***class*** or subjecting her child to a risk of ostracism by opting out . . . .") (emphases added).) The information Jane Doe allegedly received about the Bible class is not identified with any specificity in the FAC, and there are no allegations in the FAC tying that information to the purported future injuries. (*Id.* ¶ 32.) In fact, it appears that as between the Does and FFRF, only FFRF has encountered the specific curriculum, and then only in response to an apparent litigation-driven freedom of information request submitted well before Jamie Doe started school. (*Id.* ¶¶ 51-52, 65.) As FFRF should know, that allegation is not sufficient to demonstrate standing. *See Moss*, 683 F.3d at 606 (mother who "only read [promotional letter about Bible class] in preparation for this litigation" did not have standing, nor did FFRF, which, as here, "relied exclusively on her alleged injury to support its standing"); *cf. Beck*, 848 F.3d at 276-77 ("Simply put, these self-imposed harms cannot confer standing.").

2. *Plaintiffs Deal and Roe Do Not Have Standing*

Unlike the Does, Plaintiffs Deal and Roe actually encountered the Bible in the Schools program—while Roe attended Mercer County Schools as a student in the first through third grades. (FAC ¶¶ 34-47.) Deal decided that Roe would not attend the classes. (*Id.*) Beginning no later than August 2016, however—many months before Deal and Roe joined this lawsuit[11]—Deal "removed" Roe from Mercer County Schools and sent her to school in a "neighboring school district." (*Id.* ¶ 48.) "The Bible in the Schools program and the treatment Jessica received as a result of not participating in the bible [*sic*] classes were ***a major reason***" why Deal did this. (*Id.* (emphasis added).) The FAC fails to identify the ***other*** reason(s) for Deal's decision. And the FAC also fails to allege that Deal intends to re-enroll Roe in school in Mercer County if the Court enjoins the Bible classes (likely because the other reason(s) for the move remains and is compelling enough that the status quo will be maintained). This is fatal to Deal

[11] *See* Note 8, *supra*, explaining that the 2016-2017 school year began on August 10, 2016.

and Roe's claims. *See Lujan*, 504 U.S. at 561 ("The party invoking federal jurisdiction bears the burden of establishing [standing].") (citations omitted); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) ("a plaintiff must demonstrate standing separately for ***each form*** of relief sought") (emphasis added).

Deal and Roe purport to bring claims for declaratory relief, for an injunction, and for nominal damages (but, importantly, not for compensatory damages). (FAC pp. 20-21 at §§ A-D.) The claim for an injunction fails because Deal has no plans for Roe to return to school in Mercer County. There is no risk that Roe will have future contact with alleged religious establishment, and thus neither plaintiff has standing to seek prospective relief. *See Lebron v. Rumsfeld*, 670 F.3d 540, 560 (4th Cir. 2012) ("A plaintiff who seeks . . . to enjoin a future action must demonstrate that he 'is ***immediately in danger*** of sustaining some direct injury' as the result of the challenged official conduct.") (emphasis added) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)); *see also Beck*, 848 F.3d at 277 ("Plaintiffs do not have standing to seek injunctive relief . . . because allegations of . . . past Privacy Act violations are insufficient to establish an ongoing case or controversy.").

The same is true regarding the claim for declaratory relief, which is prospective in nature and thus cannot benefit Deal or Roe. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 479 (1990) ("[I]n order to pursue the declaratory and injunctive claims . . . [plaintiff] must establish that it has a specific live grievance . . . and not just an abstract disagreement over the constitutionality of such application . . . . the mere power to [do something again] is not an indication of the intent to do so, and thus does not establish a particularized, concrete stake that would be affected by our judgment.") (quotation omitted); *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) ("For a declaratory judgment to issue, there must be a dispute which calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.") (quotation omitted); *Am. Humanist Ass'n v. Greenville Cnty. Sch. Dist.*, 652 F. App'x 224, 229 (4th Cir. 2016) ("Because the Does' children no longer attend school in Greenville County, they will not be subject to injury from implementation of the revised prayer and chapel policies. We therefore grant the school district's motion to dismiss with respect to the prospective prayer and prospective chapel claims brought by the Does.").

The sole remaining claim, for nominal damages, cannot by itself give Deal and Roe standing to sue at the outset of a case, as here—it fails to meet the redressability requirement of Article III. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998) ("The 'irreducible constitutional minimum of standing' contains three requirements. . . . third, there must be redressability – a likelihood that the requested relief will redress the alleged injury.") (citation omitted); *see generally Freedom from Religion Found. Inc. v. New Kensington Arnold School Dist.*, 832 F.3d 469, 482-92 (3d Cir. 2016) (Smith, J., concurring dubitante). Nominal damages, standing alone, do not meet the redressability requirement because they do not compensate for past injury that will not recur, just as a declaratory judgment does not compensate. *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1264 (10th Cir. 2004) (McConnell, J., concurring) ("Nominal damages are damages in name only, trivial sums such as six cents or $1. They do not purport to compensate for past wrongs. They are symbolic only.") (citation omitted); *see also id.* at 1266 ("The question, as with declaratory judgment actions involving past conduct, is whether an award of nominal damages will have practical effect on the parties' rights and responsibilities in the future. . . . a declaratory judgment action involving past conduct that will not recur is not justiciable. That is equally true here. Labeling the requested relief 'nominal damages' instead of 'declaratory judgment' should not change the analysis."); *Morrison v. Bd. of Educ. of Boyd Cty.*, 521 F.3d 602, 610 (6th Cir. 2008) ("No readily apparent theory emerges as to how nominal damages might redress past [harm].").

That is why a "claim for nominal damages, which is clearly incidental to the relief sought, cannot properly be the basis upon which a court should find a case or controversy where none in fact exists." *Kerrigan v. Boucher*, 450 F.2d 487, 489-90 (2d Cir. 1971); *see also Steel Co.*, 523 U.S. at 107 ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."). Accordingly, "[b]y seeking only nominal damages," Deal and Roe are "conced[ing] at the outset . . . that they suffered no actual injury, or at least that the injury they claim cannot be redressed by an award of actual damages; thus appearing to have no standing." *Freedom From Religion Found., Inc. v. Franklin Cty., Ind.*, 133 F. Supp. 3d 1154, 1158 (S.D. Ind. 2015).[12]

3. *The Plaintiffs Cannot Be Combined into a Composite Plaintiff with Standing*

FFRF cannot bolster the standing of the Does, who have not been injured, by adding new plaintiffs and creating a fictionalized composite plaintiff with standing. The standing of each

[12] Plaintiffs may cite to the Fourth Circuit's opinion in *Covenant Media of S.C., LLC v. City of North Charleston* in response to this argument, but the Court there did not hold otherwise. It held that the case was not moot where the plaintiff sought an injunction and ***both*** "compensatory and nominal damages," explaining that if the plaintiff was determined to be correct on the merits after trial it would be entitled to "at least nominal damages." 493 F.3d 421, 429 n.4 (4th Cir. 2007). That is quite different from a case where, as here, plaintiffs' sole claim at the outset is for nominal damages. The Fourth Circuit also did not consider the redressability requirement in *American Humanist Association v. Greenville County School District*, which focused on whether a claim for nominal damages had become moot after plaintiffs moved to another state while litigation was pending and thus could no longer ask for prospective relief. 652 F. App'x at 231 ("The plaintiffs' claim for nominal damages based on a prior constitutional violation is not moot because the plaintiffs' injury was complete at the time the violation occurred."); *compare Morrison*, 521 F.3d at 611 ("While we may have allowed a nominal–damages claim to go forward in an otherwise-moot case, we are not required to relax the basic standing requirement that the relief sought must redress an actual injury.") (citations omitted); *accord Freedom From Religion Found., Inc. v. City of Green Bay*, 581 F. Supp. 2d 1019, 1032–33 (E.D. Wis. 2008) (FFRF's claim was not justiciable "where nominal damages were the only monetary relief sought from the beginning" of the case).

plaintiff must be considered individually and as to the particular claims each plaintiff has brought; "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996); *Friends of the Earth, Inc.*, 528 U.S. at 185 ("a plaintiff must demonstrate standing separately for each form of relief sought"); *cf. Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 345 (4th Cir. 1998) ("Thus courts considering class certification must . . . avoid the real risk, realized here, of a composite case being much stronger than any plaintiff's individual action would be.").

B. The FAC Does Not State a Cognizable Legal Claim

Even if Plaintiffs had standing, the Court should dismiss the FAC with prejudice because it is a facial attack on the constitutional right to offer optional Bible classes in public schools as an accommodation for the many students who are interested in receiving Bible instruction. The FAC asks for a blanket injunction against Defendants from "organizing, administering, or otherwise endorsing bible [*sic*] classes for Mercer County Schools' students in grades kindergarten through eighth grade" (FAC pp. 20-21 at § C), not for an injunction against the particular "Bible in the Schools" curriculum presently offered. And the FAC's allegations make clear that Plaintiffs' complaint is not a mere quibble with the particular curriculum of the "Bible in the Schools" program, but instead an attempt to eliminate classes of any stripe that teach about the Bible.[13] (*See, e.g.*, FAC ¶ 32 (Jane Doe "does not wish for Jamie to participate in ***any*** school bible [*sic*] courses" whatsoever); *id.* ¶ 31 ("Jane Doe is an atheist . . . ."); *id.* ¶ 113 ("Forcing Jane Doe to choose between putting her child in ***a bible*** [*sic*] ***class*** or subjecting her child to the risk of ostracism . . . .") (emphases added).) That is not a cognizable legal claim.

The Constitution does not prohibit schools from teaching about religion or from using materials that have a religious basis. *See Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam)

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[13] If Plaintiffs actually have quibbles with particular aspects of the curriculum, Defendants are and always have been willing to discuss it with them.

("The Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."). It has been settled law for more than half a century that courses in the Bible and in religion may be offered in public schools. For example, in the nearly fifty-year-old case *Epperson v. Arkansas*, the Supreme Court instructed that "[s]tudy of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition." 393 U.S. 97, 106 (1968). And in *Mellen v. Bunting*, the Fourth Circuit confirmed that if Virginia Military Academy "desires to teach cadets about religion, it is entitled to offer such classes in its curriculum." 327 F.3d 355, 372 n.10 (4th Cir. 2003) (citing with approval *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 76 (2d Cir. 2001) ("[T]he Establishment Clause does not prohibit schools from teaching about religion.").

Other caselaw supporting this proposition is voluminous. *See, e.g.*, *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963); *McGowan v. Maryland*, 366 U.S. 420, 445 (1961); *see also Altman*, 245 F.3d at 76; *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311, 1315-16 (8th Cir. 1980) (quoting *McGowan*, 366 U.S. at 445). In fact, Courts have long recognized the historical, social, and cultural significance of religion in our lives and in the world generally. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984); *Wiley v. Franklin*, 468 F. Supp. 133, 150 (E.D. Tenn. 1979) ("To ignore the role of the Bible in the vast area of secular subjects . . . is to ignore a keystone in the building of an arch, at least insofar as Western history, values and culture are concerned."). Indeed, the Supreme Court has long held that it might well be that one's education is ***incomplete*** without a study of comparative religion, or the history of religion and its relationship to the advancement of civilization. *Schempp*, 374 U.S. at 225 ("[T]he Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment."); *see also Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 236 (1948) (Jackson, J., concurring) (discussing impossibility of educating in the absence of religious culture and history); *Crockett v. Sorenson*, 568 F. Supp. 1422, 1429 (W.D. Va. 1983) ("Secular education imposes immediate demands that the student have a good knowledge of the Bible. . . . it becomes obvious that a basic background in the Bible is essential to fully appreciate and understand both Western culture and current events."). Accordingly, there is a legitimate time, place, and manner for the discussion of religion in the public classroom. *Schempp*, 374 U.S. at 225; *see Florey*, 619 F.2d at 1315-16; *Bauchman v. W. High Sch.*, 132 F.3d 542, 556 (10th Cir. 1997) (allowing that selecting religious songs for a body of choral music and religiously affiliated performance venues amounted to religiously neutral educational choices); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407 (5th Cir. 1995) (holding the Establishment Clause does not prohibit choirs from singing religious songs as part of a secular music program); *Crockett*, 568 F. Supp. at 1429 ("the Establishment Clause permits a course of Bible study to be taught in the public schools").[14]

Thus, optional Bible classes are not ipso facto unconstitutional. *Compare Hall v. Bd. of Comm'rs of Conecuh Cty.*, 656 F.2d 999, 1002 (5th Cir. 1981) ("The parties agree that study of the Bible in public schools is not per se unconstitutional"). As the allegations in the FAC make clear, this lawsuit is a challenge to the existence of classes that have anything to do with the

[14] Groups as diverse as the Anti-Defamation League, American Federation of Teachers, American Jewish Congress, Baptist Joint Committee on Public Affairs, Christian Legal Society, National Bible Association, and People for the American Way also agree that it is permissible to teach the Bible in public school. *E.g.*, The Bible Literacy Project & The First Amendment Center, *The Bible and the Public Schools: A First Amendment Guide* (1999), *available at* http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/bible_guide_graphics.pdf (last visited Apr. 18, 2017).

Bible, at all. That is not a cognizable legal theory, and requires dismissal with prejudice. *See Action NC v. Strach*, __ F. Supp. 3d. __, 2016 WL 6304731, at *4 (M.D.N.C. Oct. 27, 2016) ("A complaint may fail to state a claim upon which relief may be granted . . . by failing to state a valid legal cause of action, i.e., a cognizable claim . . . .") (citing *Holloway v. Pagan River Dockside Seafood, Inc.*, 669 F.3d 448, 452 (4th Cir. 2012)); *Schreiber v. Dunabin*, 938 F. Supp. 2d 587, 594-95 (E.D. Va. 2013) ("Courts recognize that a plaintiff can plead himself out of court by pleading facts that show that he has no legal claim.") (quotation omitted).

C. Dr. Akers Should Be Dismissed From This Litigation

Plaintiffs have not identified with specificity any action that Dr. Akers, the superintendent of Mercer County Schools, took in her individual capacity, instead relying solely on sweeping conclusory allegations. (*E.g.*, FAC ¶ 96 ("Akers has the primary duties of implementing Mercer County Schools' policies and programs . . . ."); *id.* ¶ 97 ("Deborah Akers has created policies supporting and implementing the Bible in the Schools program for approximately 25 years.").) And the one even mildly specific allegation about Dr. Akers' conduct (*id.* ¶ 98 ("In overseeing the Bible in the Schools program, Deborah Akers has coerced ***students*** into receiving religious instruction.") (emphasis added)) is not tied to anything that happened to the particular Plaintiffs in this case (*i.e.* the FAC does not say that Dr. Akers coerced ***them***). *Cf. Moss*, 683 F.3d at 605 (there is no justification for "the sweeping conclusion that parents and students currently in school may challenge the constitutionality of school policies without demonstrating that they were personally injured in some way by those policies."). This threadbare pleading is insufficient to nudge the claim against Dr. Akers "across the line from conceivable to plausible," requiring its dismissal.

> Respondent pleads that petitioners 'knew of, condoned, and willfully and maliciously agreed to subject him' to harsh conditions of confinement 'as a matter of policy, solely on account of his religion, race, and/or national origin and for no

> legitimate penological interest.' The complaint alleges that Ashcroft was the 'principal architect' of this invidious policy, and that Mueller was 'instrumental' in adopting and executing it. These bare assertions . . . amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim . . . .

Iqbal, 556 U.S. at 680–81 (quotations omitted); *See also Lizzi v. Alexander*, 255 F.3d 128, 137 (4th Cir. 2001) ("[T]he mere incantation of the term 'individual capacity' is not enough to transform an official capacity action into an individual capacity action.") (quotation omitted).[15]

D. Plaintiffs' Section 1983 Claims Against Mercer County Board of Education and Mercer County Schools Should Be Dismissed

1. *Mercer County Schools Is Not a Final Policymaking Official*

Plaintiffs' claims under 42 U.S.C. § 1983 suffer from independent infirmities beyond those discussed above. In particular, Plaintiffs fail to allege that Mercer County Schools is a final policymaking official. The law of liability for schools under § 1983 is identical to the law of liability under § 1983 for municipalities. *See Barrett v. Bd. of Educ. of Johnston Cty.*, 590 F. App'x 208, 210 (4th Cir. 2014) ("The Board, for purposes of a civil rights lawsuit under § 1983, is indistinguishable from a municipality.") (citing *Riddick v. Sch. Bd. of City of Portsmouth*, 238 F.3d 518, 522 n.3 (4th Cir. 2000)). And as the Fourth Circuit explained in *Riddick*:

> [N]ot every decision by every municipal official will subject a municipality to section 1983 liability. Rather, municipal liability attaches ***only*** when the decisionmaker possesses ***final authority*** to establish municipal policy with respect to an action ordered. To qualify as a 'final policymaking official,' a municipal officer must have the responsibility and authority to implement final municipal policy with respect to a particular course of action.

238 F.3d at 523 (citations and quotations omitted) (emphases added). In addition, "[t]he question of who possesses final policymaking authority is one of state law." *Id.* In West Virginia, the "final policy making authority for a school district resides with the members of its

[15] Dr. Akers is also entitled to qualified immunity because Plaintiffs "failed to plead sufficient facts showing that [she] violated the[ir] rights." *Barrett v. Bd. of Educ. of Johnston Cty.*, 590 F. App'x 208, 210 (4th Cir. 2014).

county board of education. . . . [which has] broad authority to control and manage the schools and school interests for all school activities and upon all school property." *Carr-Lambert v. Grant Cty. Bd. of Educ.*, No. 2:09-CV-61, 2009 U.S. Dist. LEXIS 58194, at *8 (N.D.W. Va. July 2, 2009) (citing W. Va. Code §§ 18-5-1, 18-5-13). Plaintiffs do not and cannot allege that Mercer County Schools has the responsibility or authority to implement final school policy, requiring it be dismissed.

2. *Plaintiffs Fail to Identify an Unconstitutional Board Policy*

In addition to final policymaking authority—which rests with the Mercer County School Board—Plaintiffs must plead that "the execution of a policy or custom" of the Board "caused the violation." *Barrett*, 590 F. App'x at 210 (citing *Love-Lane v. Martin*, 355 F.3d 766, 782 (4th Cir. 2004)). The FAC identifies just one Mercer County School Board policy, Policy I-45, which allegedly requires teachers to "develop lesson plans for each subject they are responsible for teaching and . . . to submit those plans to the school principal for review." (FAC ¶ 101.) The Policy also allegedly "directs school administrators to review and comment on lesson plans at least once every three months or more often as required by state policy." (*Id.* ¶ 102.) But the FAC fails to say how this Policy "caused the violation" at issue—"direct and unwelcome contact with an alleged religious establishment." *Moss*, 683 F.3d at 605 (quotations omitted).

It appears the FAC may make a roundabout attempt to say that a policy of ***Mercer County Schools*** may have caused such contact with respect to plaintiff Roe. (FAC ¶¶ 55 ("Per Mercer County Schools policy these lessons must be followed . . . ."); *id.* ¶ 39 (Roe "could still hear what was said during the bible [*sic*] class.").) But whatever Mercer County Schools did does not itself establish § 1983 liability because it is not final policymaker and there is no respondeat superior liability under § 1983. *Barrett*, 590 F. App'x at 210 (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978)); *Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520

U.S. 397, 403–04 (1997) ("Locating a 'policy' ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality."). So too of any alleged actions of superintendents, principals, or teachers. *See, e.g.*, *Moss v. Spartanburg County Sch. Dist. No. 7*, 775 F. Supp. 2d 858, 873 (D.S.C. 2011)

> Plaintiffs, however, failed to show that two instances in which the School District employees administered discipline for student misbehavior was sanctioned or ordered by a School District official with final authority or otherwise establish that the School District had adopted a custom of administering discipline for misbehavior . . . . Plaintiffs further failed to connect the [alleged violations] with any overt policy adopted by the School District or otherwise identify any decisionmaker who authorized such conduct. Plaintiffs, therefore, did not carry their burden in establishing that the School District could be subject to § 1983 liability for these alleged violations.

See also Crittenden v. Florence Sch. Dist. One, 2017 U.S. Dist. LEXIS 24325, at *5-6 (D.S.C. Feb. 22, 2017). Having failed to identify any policy or custom of the Board that "caused the violation," despite the fact that Board Policy is posted on the Internet for anyone to review,[16] the Complaint fails to state a plausible claim against the Board for violation of § 1983. *Barrett*, 590 F. App'x at 210 ("Appellants' claims against the Board of Education . . . fail because the Appellants failed to make sufficient factual allegations that move the claims from conceivable to plausible. There were no factual allegations showing that ***the Board*** had a policy, custom, or practice that led to the alleged violations.") (emphasis added); *cf. Iqbal*, 556 U.S. at 683 ("Unlike in *Twombly*, where the doctrine of *respondeat superior* could bind the corporate defendant, here, as we have noted, petitioners cannot be held liable unless they themselves acted . . . .").

III. CONCLUSION

For each of the reasons stated above, the FAC should be dismissed.

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[16] *See* Mercer County Public Schools, *Board Policy*, http://boe.merc.k12.wv.us/?q=node/22 (last visited Apr. 17, 2017). The Court may take judicial notice of this for the reasons in Note 1.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2017, the foregoing MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic case filing system and constitutes service of this filing under Rule 5(b)(2)(E) of the Federal Rules of Civil Procedure. Parties may access this filing through the Court's ECF system.

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